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No. 1038

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, Administrator, Etc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINION BELOW.

As stated in petition.

JURISDICTION.

As stated in petition.

QUESTIONS PRESENTED.

As stated in petition.

A further question is whether petitioner may have a review by certiorari in a case not falling under any of the approved grounds mentioned in Rule 38 and presenting no other question of great importance.

A still further question is whether, for the purpose of showing a long established administrative interpretation or practice, or alleged importance of the questions sought to be reviewed, petitioner may, long after the cause has left the District Court, write letters to itself and print these as an appendix to its petition for consideration on petition for certiorari, without regard to the distinctions between the original and appellate jurisdiction of the Supreme Court to be found in Section 2, Article III of the Constitution of the United States.

STATUTES INVOLVED.

The statutes mentioned in the petition and also the second paragraph of Section 2, Article III of the Constitution of the United States, as follows:

> "In all cases, affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make."

STATEMENT.

The statement in the petition is sufficient.

ARGUMENT.

I.

Petitioner's specifications of error 1, 2 and 3 deal with the construction of Section 305 of the World War Veterans' Act and the reasons for the Court of Appeals' construction of such section are so clearly and rightly set forth in its opinion in the cases of *U. S.* v. *Am. N. B. & T. Co.*, 124 F. (2) 743, and *Florian* v. *U. S.*, 114 F. (2) 990, and so well supported by *U. S.* v. *McClure*, 305 U. S. 472, that we will not further comment on those specifications of error.

II.

None of the conventional reasons for allowing certiorari stated in Rule 38 are shown in the petition to exist.

An alarmist note is sought to be injected into the matter by petitioner through writing a letter to itself and attaching the same as an appendix to its petition, calling attention to the number of insurance contracts issued. It is not to be supposed, and there is no showing, that any more than a negligible number of these would ripen into liabilities under the doctrine established in the instant case. Death, maturity of the contract, conversion to other forms of insurance which have matured or been surrendered for cash value and the statute of limitations, as well as the fact that the vast majority were not suffering from any compensable disability when the insurance lapsed, and also the present amended form of Section 305 limiting its operation to a highly restricted class of beneficiaries, make it certain that the amount to be paid on such classes

of claims will be very small. At any rate, the amount to be paid under a correct interpretation of the law ought to have no influence whatever in this court in the determination of what is a correct interpretation of that law.

III.

Petitioner's specification of error 4 deals with the alleged overturning by the Court of Appeals of an alleged consistent and long established administrative practice and interpretation. Our argument here will be confined to that specification of error.

A government practice made use of with increasing frequency is herein resorted to. We refer to the letter which the Government has written to itself February 16, 1942, printed in the appendix to its petition, and the similar one in the petition in the *Florian* case, on which it relies to prove a long established administrative interpretation and practice. We do not concede that there has been any such long established interpretation or practice, and we do not believe sufficient similar cases have arisen in the past to formulate the same. No specific administrative decisions have been cited. No such claim was made in the District Court and that court did not pass upon any such question. If such letters are to be considered by the Supreme Court on certiorari, that court must then disregard the constitutional distinctions (Section 2, Article III) between its original and appellate jurisdiction and assume original jurisdiction in this case to decide a question not presented to the District Court and without opportunity to respondent to contest that question on the facts. A very similar situation arose in Illinois under a provision of its new Practice Act, giving litigants the right to make amendments and offer evidence in courts of review which had not been made or offered in the trial

court, and the Illinois Supreme Court, in *Schmidt* v. *Eq. L. A. Soc.*, 376 Ill. 183, 197-8, decided that such a practice would involve the exercise of original jurisdiction by the court of review and would be in violation of the Constitution. The Illinois statute we refer to provides in part as follows:

> "In all appeals the reviewing court may, * * *
>
> (c) Permit such further testimony to be taken in or presented to the reviewing court as it may deem necessary, where evidence has been erroneously excluded or where there has been an omission of proof at the trial of some fact which, under the circumstances of the case, may subsequently be proved without involving any question for a jury and without substantial injustice to either party."
>
> Ill. R. S. 1939, Ch. 110, Par. 216.

Section 2, Article VI, Illinois Constitution, provides in part as follows:

> "The supreme court * * * shall have original jurisdiction in cases relating to the revenue, in mandamus and habeas corpus, and appellate jurisdiction in all other cases."
>
> Smith-H. Ill. Annot. Stat., p. 178.

In line with the same principle it has been decided that even Congress cannot give the Supreme Court original jurisdiction beyond that given in the Constitution.

> *Ex p. Vallandingham*, 1 Wall. (68 U. S.) 243, 252, 17 L. Ed. 589.
>
> *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 174-6.
>
> *F. R. C.* v. *Gen. E. Co.*, 281 U. S. 464, 469, 74 L. Ed. 969.

CONCLUSION.

Regardless of whether the case is important or not, the result below seems clearly right and agrees with the decision of the Sixth Circuit in *U. S.* v. *Lawson*, 124 F. (2) 1020. Conflict of decision does not seem likely in the future. The petition should be denied.

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